No. 95-232

In The

Supreme Court of the United States

October Term, 1995

LLOYD HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 8, 1995
Certiorari Granted November 22, 1995

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TABLE OF CONTENTS

Page

Docket Entries..... 1

Plaintiff's Original Complaint, filed April 8, 1993 .. 5

Motion for Postponement of Scheduling Conference, filed August 30, 1993..... 13

Order, entered September 1, 1993..... 15

United States' Motion to Dismiss, November 17, 1993 16

Defendant United States' Memorandum In Support of Motion to Dismiss, Filed November 17, 1993.. 18

Plaintiff's Response to United States of America's Motion to Dismiss, filed December 16, 1993..... 39

Plaintiff's Brief in Opposition to United States of America's Motion to Dismiss Filed December 16, 1993 41

Affidavit of Dagnee McKinney with attachments B, C, D, E, F, G, H, and I (attachment A is a copy of the Complaint), filed December 16, 1993..... 51

Affidavit of Melanie Seagler with attachments A, B, C, D, and E, filed December 16, 1993..... 72

United States' Motion for Judgment on the Pleadings or, in the Alternative, Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed May 13, 1994..... 86

Defendant United States' Memorandum In Support of Motion for Judgment on the Pleadings..... 88

Plaintiff's Response in Opposition to United States of America's Motion for Judgment on Pleadings or Motion to Dismiss..... 92

TABLE OF CONTENTS – Continued

Page

Opinion of the United States Court of Appeals for the Fifth Circuit ..... Pet. App. 1

Order of the United States District Court .. Pet. App. 8

RELEVANT DOCKET ENTRIES

APPEAL TRACK3

U.S. District Court
Texas, Eastern (Beaumont)

CIVIL DOCKET FOR CASE #: 93-CV-529

Henderson v. USA — Filed: 10/25/93
Assigned to: Judge Joe J. Fisher
Demand: $150,000 — Nature of Suit: 340
Lead Docket: None — Jurisdiction: US Defendant
Dkt # in SDTX, Galveston Div: is 93cv186

Cause: 46:741 Shipping

LLOYD HENDERSON
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v.

A TRUE COPY I CERTIFY
DAVID J. MALAND
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS

BY /s/ Illegible

defendant	Olen Kenneth Dodd, AUSA [COR LD NTC] US Attorney's Office 350 Magnolia Suite 150 Beaumont, TX 77701 Jefferson 409/839-2538 FTS good
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Proceedings include all events.
1:93cv529 Henderson v. USA

10/25/93	1	1	Original file, certified copy of transfer order and docket sheet received from the Galveston Division of the Southern District of Tx cause G-93-186 with 1) complaint 2) order reassigning judge 3) motion for postponement of scheduling conf 4) order granting motion for postponement 5) return 6) USA's motion to transfer case (jel) [Entry date 10/27/93]
		• • •	
11/17/93	3	34	Motion by USA to dismiss. (seal) [Entry date 11/22/93]
11/17/93	4	35	Memorandum by USA in support of [3-1] motion to dismiss (seal) [Entry date 11/22/93]

		• • •	
12/16/93	7	55	Response in opposition by Lloyd Henderson to [3-1] motion to dismiss (jel) [Entry date 12/17/93]
12/16/93	8	57	Memorandum by Lloyd Henderson in support of [7-1] motion response (jel) [Entry date 12/17/93]
12/16/93	9	67	Affidavit of Dagnee McKinney Re: [7-1] motion response (jel) [Entry date 12/17/93] [Edit date 12/17/93]
12/16/93	10	91	Affidavit of Melanie Seagler Re: [7-1] motion response (jel) [Entry date 12/17/93] [Edit date 12/17/93]
		• • •	
1/21/94	13	107	Order denying [3-1] motion to dismiss (signed by Judge Joe J. Fisher) cc: attys on 1/24/94 (csc) [Entry date 01/24/94]
		• • •	
5/13/94	30	142	Motion by USA for judgment on the pleadings, or in the alternative to dismiss for lack of jurisdiction (fxc) [Entry date 05/16/94]
5/26/94	32	147	Response by Lloyd Henderson to [30-1] motion for judgment on the pleadings, [30-2] motion to dismiss for lack of jurisdiction (fxc) [Entry date 05/31/94]
		• • •	

6/17/94	33	189	Order granting [30-2] motion to dismiss for lack of jurisdiction, pltf's claims against the United States, if any, are dismissed w/out prejudice (signed by Judge Joe J. Fisher 6/16/94) cc: parties of record 6/17/94 (fxc)
6/17/94	–		Case closed (fxc)
7/15/94	34	191	Notice of appeal by Lloyd Henderson from the order of dismissal w/o prej entered 6/17/94 Fee Status: paid (notice of appeal and docket sheet sent to Fifth Circuit 7/20/94) cc: attys 7/20/94 (w/transcript order form to atty Adler) (jel) [Entry date 07/19/94] [Edit date 07/27/94]

• • •

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
	§	NO. G-93-186
UNITED STATES OF AMERICA	§	1:93 CV529
Defendants.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

(Filed Apr. 08, 1993)

TO THE HONORABLE JUDGE AND JURY OF SAID COURT:

COMES NOW, LLOYD HENDERSON, Plaintiff in the above-entitled and numbered cause, complaining of UNITED STATES OF AMERICA, (hereinafter referred to as "Defendant"), and for cause of action would respectfully show unto this Honorable Court and Jury as follows:

I.

Plaintiff LLOYD HENDERSON is a resident citizen of the State of Texas and is an utility steward in the United States Merchant Marine.

Defendant UNITED STATES OF AMERICA is a sovereign which has consented to be sued herein under the Suits in Admiralty Act, 46 U.S.C. secs. 741-752, and the Public Vessels Act, 46 U.S.C. secs 781-790 and pursuant to

Federal Rule of Civil Procedure 4(d)(5) by delivering a copy of the summons and complaint to the United States Attorney for the Southern District at the Lyric Center, 8th Floor, 440 Louisiana, Houston, Texas and to the Honorable William P. Barr, Attorney General of the United States, Department of Justice, Room B-324, 10th Street and Constitution Avenue Northwest, Washington, D.C. 20530.

At all times material hereto, Defendant UNITED STATES OF AMERICA, owned and possessed the M/V S.S. DELMONTE, which was managed, operated and controlled by LYKES BROS. STEAMSHIP CO. in coastwise, intercoastal, and foreign commerce.

II.

Venue is proper in the Southern District of Texas, pursuant to 28 U.S.C. § 1391(a), which states that the claim may be brought where Plaintiff resides. Plaintiff resides within the Southern District of Texas.

III.

It has become necessary to bring this suit by reason of the serious and permanent injuries sustained by Plaintiff, LLOYD HENDERSON, on or about August 27, 1991. On that occasion, Plaintiff was working in the course and scope of his employment for the Defendant, UNITED STATES OF AMERICA, more specifically, as a Merchant Marine for the UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF TRANSPORTATION and, by virtue of that employment, he was working on

board a vessel owned and/or operated by Defendant, UNITED STATES OF AMERICA, which was on navigable waters. The Defendant was in the business of doing work for monetary profit with the use of vessels such as the one in which LLOYD HENDERSON was working at the time of his injuries. At the time of the injuries made the basis of this suit, Plaintiff, LLOYD HENDERSON was in the course and scope of his employment aboard the vessel in question.

IV.

By reason of the contractual relationship between Plaintiff LLOYD HENDERSON, as a member of the crew in navigable waters and the Defendant, UNITED STATES OF AMERICA, as employer of him, Plaintiff, LLOYD HENDERSON, is entitled to recover maintenance and cure for such time as he has been and will be either convalescing from his injuries under medical care or reaching his maximum improvement. This suit is therefore also maintained for maintenance and cure for which this Defendant is obligated to Plaintiff, LLOYD HENDERSON.

Defendant, UNITED STATES OF AMERICA has been persistent in failing to furnish maintenance and cure to Plaintiff, LLOYD HENDERSON. Accordingly, Plaintiff herein sues for damages arising from Defendant's failure to pay maintenance and cure.

Additionally, UNITED STATES OF AMERICA's failure to promptly pay maintenance and cure was willful and wanton and in callous and flagrant disregard of Plaintiff's rights. Such conduct on the part of Defendant

UNITED STATES OF AMERICA was intentional, recalcitrant, arbitrary and capricious. Defendant UNITED STATES OF AMERICA has no reasonable excuse for its refusal to provide maintenance and cure and has exhibited laxness in their investigation of Plaintiff's claim. Moreover, Defendant UNITED STATES OF AMERICA has made intentional misrepresentations to Plaintiff regarding his entitlement to maintenance and cure benefits which actions constituted fraud, misrepresentation and conspiracy to commit same. Such fraud and misrepresentation on the part of Defendant UNITED STATES OF AMERICA in conjunction with the wrongful refusal to provide maintenance and cure benefits and their callous disregard for Plaintiff's rights, as set out above, was to such a degree that punitive damages should be assessed and awarded against Defendant, UNITED STATES OF AMERICA, for its intentional acts, as set out above, in failing to provide your Plaintiff with maintenance and cure.

Additionally, because of Defendant UNITED STATES OF AMERICA's wrongful refusal to promptly provide Plaintiff with maintenance and cure benefits, Plaintiff was forced to hire the undersigned counsel in order to recover the maintenance and cure benefits plainly owed Plaintiff and an award of attorney's fees should be assessed against Defendant, UNITED STATES OF AMERICA for its arbitrary and capricious actions, as set out above, in failing to provide Plaintiff with maintenance and cure, which actions forced Plaintiff to hire the undersigned counsel.

V.

This case is instituted under and is controlled to an extent by the terms of what is commonly known as the "Jones Act." Plaintiff, LLOYD HENDERSON, would show that nothing he did or failed to do on the occasion in question caused or in any way contributed to cause his injuries. To the contrary, the occurrence in which Plaintiff was injured and the injuries he sustained were proximately caused by the negligence, as that term is understood in law, of the Defendant, their agents, servants and employees, who were acting in the course and scope of their employment for the Defendant at all material to this action. Plaintiff, LLOYD HENDERSON, was employed by the Defendant, UNITED STATES OF AMERICA, and was injured in the course and scope of his employment while on board the vessel in question. The Defendant, UNITED STATES OF AMERICA, owed to Plaintiff a duty to furnish him a safe place to work and a seaworthy vessel, and as applied to Plaintiff, LLOYD HENDERSON, the Defendant failed in those respects in such unseaworthiness of the vessel in question caused and resulted in the injuries and damages sustained by Plaintiff. These conditions were brought about and caused by the named Defendant.

Additionally, Plaintiff would show that the unseaworthy condition of the vessel in question was the result of the willful violation by Defendant, UNITED STATES OF AMERICA of its duties to furnish and maintain a seaworthy vessel. Accordingly, punitive damages should be assessed against UNITED STATES OF AMERICA for its willful acts and conscious and purposeful disregard of its duty to provide a seaworthy vessel.

VI.

Plaintiff would show that the occurrence in question was proximately caused by the negligence of the Defendant, UNITED STATES OF AMERICA breached its legal duty to Plaintiff and such breach caused damages and injuries to Plaintiff.

Plaintiff would further say that the Defendant, UNITED STATES OF AMERICA had the right of control over the details of the work being performed at the work site in question and the right of control over the work being performed by Plaintiff, LLOYD HENDERSON. Additionally, this Defendant had the right of control and right of supervision of the details of the procedures, equipment, devices, instructions, methods and manner of work being performed and these [sic] Defendant was negligent and are [sic] vicariously liable for failing to use ordinary care in the exercise of his right of control and supervision. Accordingly, this Defendant has liability as a Jones Act employer.

VII.

In the occurrence made the basis of this suit Plaintiff, LLOYD HENDERSON, sustained bodily injuries. By reason of these injuries and damages flowing in law therefrom, this suit is maintained. Because of the nature and severity of the injuries sustained. Plaintiff has sustained physical pain and mental anguish and in reasonable probability will continue to suffer physical pain and mental anguish in the future. At the time of the occurrence made the basis of this suit, Plaintiff was a healthy, able-bodied working man. He has and will suffer physical impairment and disfigurement. Because the occurrence in question,

Plaintiff has sustained very painful and disabling physical injuries that have caused him to sustain a loss of earnings and wage earning capacity in the past and this condition will exist into the future. Because of the nature and severity of the injuries he sustained, Plaintiff, LLOYD HENDERSON, has required medical treatment in the past and in reasonable probability will require other and additional medical treatment in the future. Charges for such medical treatment have been made in the past and those which will in reasonable probability be made in the future, have been and will be reasonable charges made necessary by the occurrence in question.

VIII.

The Defendant's conduct was in reckless disregard of the rights, safety, welfare and property of others. The conduct was based on a conscious disregard which resulted in Plaintiff's injuries. Such heedless and reckless disregard is more than momentary thoughtlessness, inadvertence or misjudgment. Such unconscionable conduct goes beyond ordinary negligence and also constitutes gross negligence, making the Defendant liable not only for the actual damages caused to Plaintiff, but also for punitive and exemplary damages. This gross negligence proximately caused the injuries to Plaintiff.

IX.

Plaintiff would additionally say and show that he is entitled to recovery of pre-judgment interest in accordance with law and equity as part of the damages herein and Plaintiff here and now sues specifically for recovery of pre-judgment interest.

X.

It is yet to early to ascertain the extent of the damages fully sustained by Plaintiff, but they clearly exceed ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($150,000.00), and the minimum jurisdictional limits of this Court. Plaintiff specifically reserves the right to amend his pleadings for a certain amount in the future.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer herein, that upon final trial and hearing hereof, the Plaintiff recover his damages in accordance with the evidence, that he recover his costs of court herein, that he recover punitive damages, that he recover interest to which he is entitled under the law, both pre-judgment and post-judgment, and for such other and further relief, general and special, legal and equitable, to which he may show himself justly entitled.

Respectfully submitted,

JIM S. ADLER, P.C.

BY: /s/ J. K. Ivey
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff, VS. UNITED STATES OF AMERICA, Defendant.	§ § § § § § § §	CIVIL ACTION NO. G-93-186 1:93 CV 529

MOTION FOR POSTPONEMENT OF SCHEDULING CONFERENCE

(Filed Aug. 30, 1993)

TO THE HONORABLE SAMUEL B. KENT:

Comes now, LLOYD HENDERSON, and requests a postponement of the scheduling conference and would respectfully show unto the Court as follows:

I.

Plaintiff filed its Original Complaint on April 8, 1993 against the UNITED STATES OF AMERICA, Defendant. On or about May 25, 1993, Counsel for Defendant mailed citations to be served upon the UNITED STATES OF AMERICA to Constable Jack Abercia in Houston, Texas. Constable Jack Abercia's office contacted counsel for Plaintiff's office on June 1, 1993 and stated that two Summons in a Civil Action forms were needed with Court seals. Counsel for Plaintiff requested said forms

from the U. S. District Clerk. Said forms were inadvertently lost in the mail and never reached the offices of Plaintiff's counsel. Plaintiff's counsel again requested these forms on August 18, 1993.

Counsel for Plaintiff is requesting a postponement of the scheduling conference until Defendant, UNITED STATES OF AMERICA, can be served. Counsel for Plaintiff believes that service can be effected within thirty (30) days after receipt of the Summons in a Civil Action forms [sic] with court seals.

WHEREFORE, premises considered, Plaintiff, LLOYD HENDERSON, prays that the Court will postpone the scheduling conference presently set for September 1, 1993 at 9:40 a.m. for a date at least thirty days after Plaintiff has again attempted service upon Defendant, and for such other relief to which Plaintiff may show himself entitled.

Respectfully submitted,

JIM S. ADLER, P.C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. G-93-186
Defendant.	§	1:93 CV 529

ORDER

(Filed Sep. 01, 1993)

Before the Court is Plaintiff's Motion for Postponement of Scheduling Conference. The plaintiff asks for a postponement because the defendant has not been served. This case was filed over four months ago, and it is,

ORDERED that the plaintiff serve the defendant, the United States of America, within fifteen days. Further, it is,

ORDERED that Plaintiff's Motion for Postponement of Scheduling Conference is GRANTED. The scheduling conference is reset for 10:00 a.m., November 8, 1993.

Done this the 31st day of August, 1993 at Galveston, Texas.

/s/ Hugh Gibson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON Plaintiff, vs. UNITED STATES OF AMERICA Defendant.	)	C.A. NO. 9-CV-529

UNITED STATES' MOTION TO DISMISS

(Filed Nov. 17, 1993)

The Defendant moves this Court to dismiss the United States pursuant to Rules 12(b)(1) Fed. R. Civ. P. In support of this motion the United States relies upon the pleading, Memorandum Of Law In Support with attachments.

WHEREFORE, the United States prays that this motion to dismiss the United States be granted and the attached Order entered.

Dated: November 15, 1993

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	)	
	)	
Plaintiff,	)	C.A. NO.
vs.	)	9-CV-529
UNITED STATES OF AMERICA	)	
	)	
Defendant.	)	
	)	

DEFENDANT UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

(Filed Nov. 17, 1993)

STATEMENT OF FACTS AND INTRODUCTION

The plaintiff, Lloyd Henderson, claims he suffered injuries on August 29, 1991, while working as a seaman aboard the M/V DELMONTE, a vessel owned by the United States through the Maritime Administration (MarAd) and managed by its' General Agent. On May 29, 1992, the plaintiff filed an administrative claim, as required by the Clarification Act, 50 U.S.C. app. § 1291. Sixty days later, the claim was administratively disallowed by MarAd pursuant to regulations contained in 46 C.F.R. Part 327.7. On April 8, 1993, this suit was filed in the Southern District of Texas against the United States. [*See* attached copy of first page of plaintiff's Complaint]. Time passed. On September 3, 1993, **150 days after filing the Complaint,** the plaintiff's properly effected service upon the United States Attorney. [*See* attached copy of

Summons].[1] Subsequently, the case was transferred to this Court.

This Court's jurisdiction over the plaintiff's claim derives from the Suits in Admiralty Act (SAA), 46 U.S.C. app. §§ 741-752. Pursuant to § 742 of the SAA, the plaintiff's claim against the United States should be dismissed pursuant to Rule 12(b) (1) for failure to affect forthwith service on the United States.

ARGUMENT

I. The Forthwith Service Provision Is A Jurisdictional Prerequisite.

As an initial matter, the burden of establishing subject matter jurisdiction lies with the plaintiff, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); government attorneys have "no power to waive conditions or limitations imposed by statute in respect of suits against the United States," *Munro v. United States*, 303 U.S. 36, 41 (1938) (citation omitted); and the immunity of the United States is not to be waived by a court's policy based determinations, however compelling. *Library Of Congress v. Shaw*, 478 U.S. 310, 321 (1985). It is equally well established that

> [t]he United States, as sovereign, is immune from suit except as it waives its immunity, and the terms of its waiver, as set forth expressly

[1] The Attorney General of the United States was served with process on May 25, 1993.

> and specifically by Congress, define the parameters of a federal court's subject matter jurisdiction to entertain suits brought against it. . . . The conditions that Congress imposes upon its waiver of immunity should be strictly construed.

Ware v. United States, 626 F.2d 1278, 1286 (5th Cir. 1980) (citations omitted); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *McMahon v. United States*, 342 U.S. 25, 27 (1951).

The SAA was passed in 1920 to resolve the inadequacies and inequities of existing law.[2] *See McCormick v. United States*, 680 F.2d 345, 348 (5th Cir. 1982) (citing *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 178-171 (1976)). As was explained by the Supreme Court, congress intended the SAA to be a comprehensive statute which,

> furnishes a complete system of administration, applying to the United States . . . by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation. . . . [i]t follows that after passage of the [SAA] no libel in admiralty could be maintained against the United States . . . on such causes of action except in accordance with its provisions . . .

[2] *See generally, Authorizing Suits Against the United States in Admiralty, etc., Hearing on H.R. 7124 Before the House Comm. on the Judiciary*, 66th Cong., 1st Sess. (1919); *Suits in Admiralty Against the United States, Hearing on S. 2253 Before Senate Comm. on Commerce*, 66th Cong., 1st Sess. (1919); and Cong. Rec. House at 1679-1680 January 7, 1920.

United States Shipping Board Emergency Fleet Corp. v. Rosenberg Bros. & Co., et al., 276 U.S. 202, 213-214 (1927).[3] The legislative history of the SAA explains the purpose of the forthwith service requirement.

At the time of its enactment, Congress noted the unique nature of admiralty law and was concerned that the SAA reflect the need for prompt and immediate action (forthwith) inherent in admiralty litigation. Ira A. Campbell, Special Assistant to the Attorney General in Admiralty, who helped draft the SAA stated:

> Mr. Campbell. This bill . . . is providing the machinery by which all admiralty litigation can be handled. Here is what you are facing as the results of conditions today. . . . **There is no litigation which requires such prompt and immediate action, if it is properly taken care of, as admiralty litigation**[,] . . . because your witnesses are all sailors, as a rule; your vessels come into the port where sailors disappear and you cannot find them. So it may be that your case will be won or lost upon the one man whom it is impossible to locate. . . . [In]asmuch as Congress is passing these [private] bills constantly, and creating the right of suit in these

[3] In 1925 Congress passed the Public Vessels Act [PVA], 46 U.S.C. App. §§ 781-790 (1988), which extended the United States' waiver of sovereign immunity to include admiralty actions involving public vessels, e.g. naval vessels. The PVA incorporated those provisions of the SAA which are not inconsistent. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 227 (1944). The PVA and the SAA are exclusive and distinct statutes which, together, constitute the United States' waiver of sovereign immunity in admiralty actions. *United Continental Tuna Corp.*, 425 U.S. at 178-182.

> cases, it might be well to consider the advisability of authorizing such litigation, so that the litigation may be taken care of promptly by the Government.

Suits in Admiralty Against the United States, Hearing on S. 2253 Before Senate Comm. on Commerce, 66th Cong., 1st Sess. at 27-28 (1919) (emphasis added); *Merchants National Bank et al. v. The DREDGE GENERAL G.L. GILLESPIE, etc., et al.,* 663 F.2d 1338, 1348 (5th Cir. 1981); *see also Marich v. United States, et al.,* 84 F. Supp. 829, 832 (N.D. Cal. 1949).

Because, the SAA grants the waiver of sovereign immunity to pursue an *in personam* action against the United States in admiralty, with the right to proceed on *in rem* principles, Congress had to adopt a method of process approximating the jurisdictional requirements applicable to both *in rem* and *in personam* actions. Supplemental Rules C(3) and E(4) which govern *in rem* admiralty actions, reflect the need for prompt and immediate (forthwith) service of process and are similar to the Admiralty Rules in effect at the time the SAA was passed. *Merchants National Bank* at 327 n.38. Supplemental Rule E(4) (a) provides in pertinent part: "Upon issuance and delivery of the process . . . the marshal or other person or organization having a warrant **shall forthwith execute the process**. . . . "[4] (emphasis added).

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[4] Prior to a 1985 amendment, which added requirement of judicial scrutiny before the issuance of a warrant for arrest of the vessel, Supplemental Rule C(3) provided:

> Upon the filing of the Complaint the clerk shall **forthwith issue a warrant for the arrest of the vessel** or other property that is the subject of the action and deliver it to the marshall for service.

Consistent with Congress' original intent the SAA requirement that process be issued forthwith reflects the existing law for obtaining *in rem* jurisdiction in private admiralty litigation; i.e. immediately. Congress substituted the forthwith issuance of a warrant of arrest, with the forthwith service of the summons upon the Attorney General and the United States Attorney. As such, it has substance and is an integral part of the United States' maritime waiver of sovereign immunity. As Congressman Volstead stated in the House of Representatives in 1920:

> The bill [which became the SAA] provides that instead of securing jurisdiction by seizure of a ship, suit may be brought by service of summons upon the Attorney General and that upon such service the government shall become liable without an attachment. . . . In lieu of this we provide a remedy by a suit *in personam* against the government.

Cong. Rec. House, at 1680, January 7, 1920. Accordingly, a plaintiff bringing an admiralty action *in personam,* or *in personam* on *in rem* principles against the United States must, as a condition to the right to sue, comply with the forthwith service requirement of the SAA.

II. The Fifth Circuit Has Held That The Forthwith Service Requirement Is Jurisdictional.

The Fifth Circuit in *Kieu v. United States,* 1993 AMC 1789, 1791 (5th Cir. 1992) (per curiam) (not otherwise reported), held that the forthwith service requirement of

---

See Advisory Committee Note to 1985 Amendment of Supplemental Rule C(3).

§ 742 of the SAA is jurisdictional. The plaintiffs in *Kieu* sought to relate back their amended complaint to name the United States, not the Department of Energy, as the proper defendant under the SAA. By the time the plaintiffs properly served the amended complaint upon the United States pursuant to the § 742 of the SAA, the two-year statute of limitations had run. 46 U.S.C. app. § 745.

The district court in *Kieu* held that the plaintiffs' original filing against the Department of Energy did not comply with the jurisdictional prerequisites of § 742 and § 745 and, consequently, refused to relate back the amended complaint, dismissing the claim for lack of subject matter jurisdiction. *Ahn Thi Kieu, et al. v. United States Department of Energy,* No. 1: 90 cv 861, (E.D. Tx. May 24, 1991) (Judge Schell) (unpublished opinion) (copy attached).

The *Kieu* panel affirmed holding that service of process in an admiralty action against the United States must comply with the jurisdictional requirements of § 742 of the SAA. *Kieu,* 1993 AMC at 1791 (citing *Amella v. United States,* 732 F. 2d 1229, 1231 (9th Cir. 1981)); *see Watts v. Pinckney,* 752 F.2d 406, 408 (9th Cir. 1985) and *Wish v. United States,* 1979 AMC 2858, 2859 (N.D. Cal. 1979) (same holdings based on similar facts).[5]

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[5] Three of the four other Circuit Courts addressing the issue agree with the Fifth circuit; the SAA forthwith service requirement is jurisdictional. *Battaglia v. United States,* 303 F.2d 683, 685-686 (2d Cir. 1962), *cert. dismissed,* 371 U.S. 907; *Amella,* 732 F.2d at 1231 (9th Cir.); *Libby v. United States,* 840 F.2d 818, 820 (11th Cir. 1988). The only circuit holding otherwise was the Third Circuit in *Jones & Laughlin Steel, Inc. v. Mon River Towing,*

Subsequent to the Fifth Circuit's decision in *Kieu,* Judge Schell again addressed the forthwith service issue. *Landry v. United States, et al.,* 815 F.Supp. 1000, 1003 (1993) (appeal pending). The *Landry* court recognized the precedent set in *Kieu* and upheld the jurisdictional nature of the forthwith service provision, dismissing a claim against the United States for lack of subject matter jurisdiction wherein service was not affected until 110 days. The holding in *Landry* was followed by the United States District Court for the Eastern District of Louisiana in *Michael Hall v. Maritime administration et al.,* No. 92-3020, 1993 WL 139507 at *2, LEXIS 5753 at *2 (E.D. La. April 27, 1993) (not otherwise reported) (service of process at 126 days not forthwith); *but see Holmberg v. OMI Ship Management, Inc.,* No. 92-3749, WL 165774 (E.D. La. May 6, 1993) (not otherwise reported) (appeal pending).

III. Service Of Process Affected After 150 Days Is Not Forthwith.

The plaintiff in this case did not properly serve the United States until 150 days after his complaint was filed. The term "forthwith" is not defined in the SAA. A court is not, however, without guidance as to the meaning of the term. The Supreme Court recently held that "[w]hen a

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Inc., 772 F.2d 62 (3rd Cir. 1983); *accord Estain v. United States,* No. 92-479, 1992 WL 125348 at *2, LEXIS 7946 (E.D. La. June 2, 1992) (decided subsequent to, but not citing *Kieu*) (not otherwise published); *but c.f. Hudson Trading Co. Inc. v. United States,* 28 F.2d 744, 746 (3rd Cir. 1928) ("When consent [by the United States to be sued] has been given, the conditions, upon which [it] has consented to be sued, must be complied with, even though they be purely formal") (citations omitted).

word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *John Angus Smith v. United States*, ___ U.S. ___; 124 L. Ed. 2d 138, ___; 61 U.S.L.W 4503, 4505 (1993); *see Caminetti v. United States*, 242 U.S. 470, 485 (1917) (statutory language should be given its plain meaning); 82 C.J.S. *Statutes* § 329.b (1953 & Supp. 1992). In fact, the Supreme Court defined forthwith "in matters of practice and pleading . . . as usually construed and sometimes defined by rule of court, as within 24 hours." *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 193 (1900).

The ordinary and natural meaning of the forthwith service requirement is that a plaintiff must serve the complaint on the United States at once, as soon as possible, without delay, now, straightaway, immediately, directly, instantly, presently, promptly, and with all reasonable dispatch under the circumstances. *See Black's Law Dictionary* 654 (6th ed. 1990); 37 C.J.S. *Forthwith* § 1 (1953 & Supp. 1992); William P. Statsky, *Legal Thesaurus/Dictionary* 335 (West 1985). Courts interpreting the term "forthwith" have generally done so according to its plain meaning.

The Fifth Circuit said the term forthwith was left

> deliberately undefined, in our view, to allow courts to interpret it in the context of "reasonableness," on a case by case basis. We are convinced that "forthwith" requires no more or less than reasonable promptness, diligence or dispatch . . . , considering the difficulties actually encountered in attempting to perform the task. **The term "forthwith" clearly will not tolerate delay**. . . .

United States v. Bradley, 428 F.2d 1013, 1015-16 (5th Cir. 1970) (discussing the term "forthwith" as it appears in Rule 41, Fed. R. Crim. P. governing the issuance of a warrant for arrest) (footnotes omitted) (emphasis added). The Eleventh Circuit relied on the *Bradley* court's reasonable dispatch, no delay definition of the term "forthwith" and held that service on the 24th day was forthwith pursuant to the SAA. *Libby v. United States*, 840 F.2d 818, 820 (11th Cir. 1988).

The Second Circuit defined the term forthwith contained in § 742 as meaning "immediately, without delay, or as soon as the object may be accomplished by reasonable exertion," and that service made after two months was not forthwith. *City of New York v. McAllister Bros.*, 278 F.2d 708, 710 (2nd Cir. 1960) (adding that even a relaxed interpretation of the term "forthwith" could not permit a delay of two months in service); *Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir. 1962), *cert. dismissed*, 371 U.S. 907 (4½ months is not forthwith).

Courts have no trouble determining what constitutes forthwith service pursuant to § 742. *E.g. Landry*, 815 F.Supp. at 1003 (110 days is not forthwith); *Hall*, 1993 WL 139507 at *2 (126 days is not forthwith); *Amella*, 732 F.2d at 713 (63 days is not forthwith); *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981) (60 days is not forthwith); *Barrie v. United States*, 615 F.2d 829, 830 (9th Cir. 1980) 62 or 64 days is not forthwith); *Owens v. United States*, 541 F.2d 1386, 1387 (9th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) (58 days is not forthwith); *Watts*, 752 F.2d at 408 (33 months is not forthwith); *Erdman v. Hudson Waterways Corp., et al.*, 713 F. Supp. 706, 709 (S.D. N.Y. 1989) (80 days is not forthwith); *Pezzola v. United States*,

618 F.Supp. 544, 548 (D.C.N.Y. 1985) (more than one year is not forthwith); *Halperlin v. United States*, 610 F. Supp. 8, 12-13 (S.D. Fla. 1985) (93 days is not forthwith); *O'Halloran v. United States*, 817 F.Supp 829, 833 (N.D. Cal. 1993) (77 days is not forthwith) (appeal pending); *Wish*, 1979 AMC at 2859 (58 days is not forthwith); *Moore v. United States*, 1978 AMC 815, 816 (N.D. Cal.) (90 days is not forthwith); *Smyer v. United States*, 1978 AMC 817, 820 (N.D. Cal.) (98 days is not forthwith); *c.f. Gajewski v. United States*, 540 F. Supp. 381, 384-85 (S.D.N.Y. 1982) (18 days is forthwith).

IV. Forthwith Service Is A Condition Precedent To The Substantive Right To Sue The United States, And Cannot Be Superseded By Rule 4(j) Federal Rules Of Civil Procedure.

The Federal Rules of Civil Procedure were enacted in 1938 and enabled by the Rules Enabling Act of 1934 (1988) which states, in pertinent part: "The Supreme Court shall have the power to prescribe general rules of practice and procedure. . . . Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect . . . " 28 U.S.C. § 2072(a), (b) (1988). *See Hanna v. Plumer*, 380 U.S. 460, 470-71 (1965). Only if deemed "procedural" can a law be superseded by rules promulgated pursuant to the Rules Enabling Act. *See Sibbach v. Wilson*, 312 U.S. 1, 14 (1940) (defining procedure as "the judicial process for enforcing rights and duties recognized by

substantive law"); *c.f. Amella*, 732 F.2d at 713 (the assumption that a Federal Rule of Civil Procedure can amend an act of Congress is dubious).[6]

The Supreme Court in *Sherwood* addressed the effect of the Federal Rules of Civil Procedure upon the United States' waiver of sovereign immunity:

> An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction . . .
>
> . . . The matter is one not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. . . . The jurisdiction [limited by conditions contained in the statute] is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

Id. 312 U.S. at 589-90 (quoted in *Libby*, 840 F.2d at 820). Since the forthwith service requirement is not procedural, but is an integral element of the maritime waiver of sovereign immunity granted by the SAA, no procedural rule may supersede the forthwith service provision. *Sibbach*, 312 U.S. at 10 (a court may not restrict the jurisdiction conferred by statute pursuant to the Rules Enabling Act); *see Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964) (a

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[6] *C.f.* 28 U.S.C. § 2071, which provides in pertinent part: "The Supreme court . . . may . . . prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress. . . . " (quoted in *Orpen v United States*, 1973 AMC 914 (N.D. Cal.) (the service requirements of § 742 are not superseded by Rule 4, Fed. R. Civ. P.).

rule must regulate procedure, not substantive rights, to be within the scope of the Enabling Act).

Consequently, the forthwith service requirement cannot be superseded by Rule 4(j), or any procedural rule promulgated pursuant to Rules Enabling Act.[7] *Libby*, 840 F.2d at 821; *Amella*, 732 F.2d at 713; *see Messenger v. United States*, 231 F.2d 328, 332 (2d Cir. 1956) (the Federal Rules were not indented to enlarge the substantive jurisdiction of the federal courts); *Sibbach*, 312 U.S. at 10; 2 *Moore's Federal Practice* R1 ¶ 1.05 ("the Rules can never extend the jurisdiction of the court [over the United States]").

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[7] Rule 4(j) was enacted in 1983. Act of Jan. 12, 1983, Pub.L. No. 97-462, § 2, 96 Stat. 2527 and provides, in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

F. R. Civ. P. Prior to Rule 4(j), the Federal Rules did not prescribe a time limit for service of a summons and complaint. If service of process was unreasonably dilatory, a court could dismiss the action pursuant to Rule 41(b), Fed. R. Civ. P. for failure to prosecute. *See Messenger*, 231 F.2d at 329 (original proposal to abate action for failure to serve process by 60th day after filing was dropped). The Advisory Committee Note accompanying Rule 4(j) explains its purpose: "As long as service was performed by marshals such a restriction was not necessary. However, the proposed gradual elimination of marshal service raises new concerns about timeliness." 93 F.R.D. 255, 263.

CONCLUSION

For the foregoing reasons, the district court's order denying the United States' Motion To Dismiss should be reversed. Dated: November 15, 1993

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
TIMOTHY R. LORD,
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Telephone: (202) 616-4026

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. G-93-186
Defendants.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

(Filed Apr. 8, 1993)

TO THE HONORABLE JUDGE AND JURY OF SAID COURT:

COMES NOW, LLOYD HENDERSON, Plaintiff in the above-entitled and numbered cause, complaining of UNITED STATES OF AMERICA, (hereinafter referred to as "Defendant"), and for cause of action would respectfully show unto this Honorable Court and Jury as follows:

I.

Plaintiff LLOYD HENDESON is a resident citizen of the State of Texas and is an utility steward in the United Stats Merchant Marine.

Defendant UNITED STATES OF AMERICA is a sovereign which has consented to be sued herein under the Suits in Admiralty Act,. 46 U.S.C. secs. 741-752, and the Public Vessels Act, 46 U.S.C. secs 781-790 and pursuant to

* * *

Illegible
Precinct #1, Harris County, Texas
BY /s/ Illegible
Deputy

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFFS ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Served U.S. Attorneys' Office
Date Sept. 3, 1993 Time 10:20 Initial SC

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Linda Beauchamp

DATE
7-22-93

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ANH THI KIEU, ET AL	*	
VS.	*	
	*	1: 90 CV 861
U.S. DEPARTMENT OF ENERGY	*	

ORDER OF DISMISSAL

(Filed May 24, 1991)

CAME ON TO BE HEARD this day the motion of the defendant, United States of America, to dismiss the plaintiffs' complaint and amended complaint in the above-captioned and numbered cause, and the Court, after considering said motion, the response and the various arguments of counsel, is of the opinion that the motion is meritorious and should be granted.

The facts of the matter are as follows. The plaintiff filed a complaint with the court naming the United States Department of Energy (DOE) as the defendant on October 31, 1990. This complaint has not been served on DOE, the United States Attorney or the Attorney General of the United States. The statute of limitations ran on November 3, 1990, pursuant to the two year limitations provision of the Suits in Admiralty Act (SAA). 46 U.S.C. §§ 741, 745. On November 26th, 1990, the DOE received a notice from the court indicating suit had been filed. DOE called the United States Attorney, who in turn contacted plaintiff's counsel and told plaintiff's counsel that the wrong party had been sued (DOE instead of the United States) and that service needed to be effected on the U.S. Attorney

General and the United States Attorney for the Eastern District of Texas. On December 5th, 1990, the plaintiff filed an amended complaint naming the correct parties which was served on the U.S. Attorney on the same day and on the Attorney General on December 10th, 1990.

The plaintiff argues that under Fed. R. Civ. P. 15(c) the amended complaint should be allowed to relate back to the original complaint, which was filed prior to the expiration of the statute of limitations. The U.S. argues that because the incorrect party was sued in the original complaint and because the correct party was not served before the statute of limitations ran, this court does not have subject matter jurisdiction of the suit and there is nothing for the amended complaint to relate back to under the rule.

The Fifth Circuit has held that statutes which embody the waiver of sovereign immunity are to be strictly construed. *Carr v. Veterans Administration*, 522 F.2d 1355, 1357 (5th Cir. 1976). The SAA requires the United States of America be sued. 46 U.S.C. § 745; *Williams v. U.S.*, 711 F.2d 893, 897-898 (9th Cir. 1983); *Doyle v. Bethlehem Steel Corp.*, 504 F.2d 911, 912-913 (5th Cir. 1974). The SAA further requires service on the Attorney General and the United States Attorney. 46 U.S.C. § 742. In this case, the United States was not served prior to the expiration of the statute of limitations on November 3rd, 1990 (nor was the DOE, even though they were not a proper party). Thus, this court cannot allow the relation back of the amended complaint because there is no valid complaint filed within the statute of limitations to which it may properly relate back. The plaintiffs' argument that the DOE had notice of the plaintiffs' "claims" for over a

year fails to properly apply Fed. R. Civ. P. 15(c), which requires notice of the institution of the "action" against it. Notice of administrative claims is not equivalent to notice that a lawsuit has been filed. *Craig v. U.S.*, 413 F.2d 854, 858 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969); *Holden v. R.J. Reynolds Ind.*, 82 F.D.R.157, 161 (M.D. N.C. 1979). As DOE did not receive notice of the institution of this suit within the limitations period, this argument is unpersuasive.[1]

It is, therefore, **ORDERED** that the motion of the defendant, the United States of America, is **GRANTED**, and the complaint and amended complaint of the plaintiffs are **DISMISSED**.

SO ORDERED.

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[1] Moreover, we note that three circuits have declined to impute knowledge of an agency to the U.S. under circumstances similar to these. *Allgeier v. U.S.*, 909 F.2d 869, 874 (6th Cir. 1990); *Johnston v. U.S. Postal Service*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 54, 107 L.Ed.2d 23 (1989); *Allen v. Veterans Admin.*, 749 F.2d 1386, 1389 (9th Cir. 1984). While only one Second Circuit district court case has held to the contrary. *Murray v. U.S. Postal Service*, 550 F.Supp. 1211 (D.Mass. 1982). The plaintiff's argument that the Fifth Circuit would follow *Murray* is not entirely persuasive. Nor, do we think that, if presented squarely with this question, the Fifth Circuit would necessarily hold that service to a responsible government official in an agency would impute knowledge of the commencement of an action to the United States on the basis of dicta in *Carr, supra*, especially when Fed. R. Civ. P. 15(c) is considered in conjunction with Fed. R. Civ. P. 4(d)(4). *Edwards v. U.S.*, 755 F.2d 1155 (5th Cir. 1985), is distinguishable because the U.S. Attorney was served within the statute of limitations in that case, so a responsible government official was timely served within the meaning of the note to Fed. R. Civ. P. 15(c).

SIGNED this the 24th day of May, 1991.

/s/ Richard A. Schell
RICHARD A. SCHELL
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Defendant United States' Motion To Dismiss, Memorandum In Support with attachments and proposed Order were mailed via United States' Mail service on November 16, 1993 to the following counsel of record:

J.K. Ivey, Jim Adler
6161 Savoy, Suite 700
Houston, TX 77036-3397
(713) 953-9400

/s/ Timothy R. Lord
TIMOTHY R. LORD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. 93-CV-529
Defendants.	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION TO DISMISS

(Filed Dec. 16, 1993)

Plaintiff, LLOYD HENDERSON, files this Response in Opposition to the Motion to Dismiss (the "Motion") of Defendant, UNITED STATES OF AMERICA, on the following grounds: 1) Defendant's Motion was not timely filed pursuant to Fed. R. Civ. P. 12(b); 2) the requirement of "forthwith" service has been superseded by Fed. R. Civ. P. 4, *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985); 3) Plaintiff's service was "forthwith," in that Plaintiff affected service with reasonable promptness, diligence and dispatch, *United States v. Bradley*, 428 F.2d 1013, 1015-16 (5th Cir. 1970); and 4) the Hon. Hugh Gibson, a judge of the Southern District of Texas, considered Plaintiff's difficulties in obtaining service and granted a fifteen (15) day extension to obtain service on Defendant on August 31, 1993, thereby impliedly finding "due diligence" and "good cause" existed on Plaintiff's part.

Plaintiff incorporates by references it [sic] Brief in Opposition to the Motion to Dismiss of Defendant, UNITED STATES OF AMERICA, the Affidavit of Dagnee McKinney, the Affidavit of Melanie Seagler, and the Affidavit of J. K. Ivey, filed contemporaneously herewith.

WHEREFORE, Plaintiff prays that Defendant's Motion to Dismiss be, in all things, DENIED.

Dated: December 15, 1993.

Respectfully submitted,

JIM S. ADLER, P.C.
/s/ J. K. Ivey
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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. 93-CV-529
Defendants.	§	

PLAINTIFF'S BRIEF IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION TO DISMISS

(Filed Dec. 16, 1993)

Plaintiff, LLOYD HENDERSON, files this Brief in Opposition to the Motion to Dismiss (the "Motion") of Defendant, UNITED STATES OF AMERICA, and would respectfully show as follows:

STATEMENT OF FACTS[1]

Plaintiff was injured on August 29, 1992, while working as a seaman aboard the M/V DELMONTE, a vessel owned by the United States through the Maritime Administration. On May 29, 1992, Plaintiff filed an administrative claim for his injuries, as required by the Clarification Act. 50 U.S.C. § 1291. Sixty days later, the

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[1] The following Statement of Facts includes a summary of the Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey, which are incorporated herein by reference.

claim was denied. The foregoing is admitted by Defendant.

On April 8, 1993, Plaintiff timely commenced this action against Defendant in the United States District Court for the Southern District of Texas, Galveston Division. Summons forms were not received by Plaintiff's counsel, as requested, with file stamped copies of the Complaint. Summons forms were obtained, completed, and then forwarded to the District Clerk for the Southern District of Texas, Galveston Division, on April 21, 1993. The completed summons were received by Plaintiff's counsel on May 3, 1993.

On May 19, 1993, Plaintiff's Summon and Complaint was sent via certified mail to the United States Attorney General, and received on May 25, 1993.

On May 26, 1993, Plaintiff's Complaint was forwarded for service to Constable Jack Abercia by Plaintiff's counsel, for service on U.S. Attorney for the Southern District of Texas. On June 1, 1993, Constable Jack Abercia's office wrote to Plaintiff's counsel that it required the Court's seal on each summons form prior to serving, and that it needed two additional summons forms.

Plaintiff's counsel again requested, via mail, additional summons forms from the U. S. District Court. When then [sic] were not received, Plaintiff's counsel called the Clerk, and informed the Clerk's office that they were not received. Plaintiff's counsel sent duplicate copies of the summons forms, to replace the ones that were apparently lost in the mail.

Plaintiff's counsel again requested the summons forms from the District Clerk's office on July 19, 1993 and August 18, 1993. Upon receiving the duplicate, file stamped summons, they were transmitted a second time to Constable Abercia's office on August 25, 1993.

On August 31, 1993, Judge Hugh Gibson considered Plaintiff's difficulty in obtaining service, and granted Plaintiff an additional fifteen (15) days to obtain service on the Defendant. Service was obtained on September 3, 1993. In an abundance of caution, a second Complaint was sent to Washington, D.C., on September 3, 1993, for personal service upon Hon. William Barr, Attorney General for the United States of America.

On October 15, 1993, Defendant first appeared herein and filed its Unopposed Motion to Transfer Venue, seeking to transfer this matter to the Eastern District of Texas, Beaumont Division. The Motion to Transfer Venue was granted. On November 15, 1993, Defendant filed its Motion to Dismiss. Defendant asserts that Plaintiff did not "forthwith" obtain service on the United States Attorney, as required by the Suits in Admiralty Act, in that 150 days elapsed between the filing of Plaintiff's Complaint and service on the United States Attorney for the Southern District of Texas. 46 U.S.C. § 742, For the reasons stated below, Defendant's Motion is without merit and should be, in all things, DENIED.

ARGUMENT

I. Defendant's motion was not timely filed pursuant to Fed. R. Civ. P. 12(b).

Defendant first appeared in this action by its Motion to Transfer Venue filed October 15, 1993. Defendant's Rule 12(b) Motion to Dismiss was not filed until November 15, 1993. Plaintiff maintains this did not constitute timely assertion of a Rule 12(b) Motion.

Defendant asserts that its Motion is filed pursuant to Fed. R. Civ. P. 12(b)(1); however, Plaintiff asserts that the Motion would be more properly asserted under Rule 12(b)(2), lack of jurisdiction over the person, or Rule 12(b)(4), insufficiency of service of process.[2] Rule 12(b)(h) provides that a "defense of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived if omitted from a motion in the circumstances described in subdivision (g) . . . "

Thus, as stated by Wright and Miller:

> . . . the message conveyed by the present version of Rule 12(h)(1) seems clear. It advises a litigant to exercise great diligence in challenging personal jurisdiction, venue, or service of process. If he wishes to raise any of these defenses he must do so when he makes his first defensive move . . .

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[2] This is because the "forthwith" provision of 46 U.S.C. § 742 is merely procedural and has been superseded by the enactment of Fed. R. Civ. P. 4(d)(4) and 4(j). *See Jones & Laughlin Steel v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985), discussed *supra*.

Wright and Miller, Federal Practice & Procedure Civil, Volume 5, 855. The Fifth Circuit has stated that, "it should be equally clear that the failure of a party to object at the first opportunity available to it to raise the question by motion amounts to a waiver of whatever rights the party may have had." *T & R Enterprises, Inc. v. Continental Grain Co.*, 613 F.2d 1272, 1277 (5th Cir. 1980).

In the instant case, Defendant appeared by filing its Motion to Transfer Venue and did not object to personal jurisdiction, or insufficiency of service of process. Accordingly, Defendant has waived such defenses and its Motion to Dismiss should be, in all things, DENIED.

II. The requirement of "forthwith" service has been superseded by Fed. R. Civ. P. 4.

Defendant contends that Plaintiff's service on the United States Attorney for the Southern District of Texas was not "forthwith" as provided by the Suits in Admiralty Act, 42 U.S.C. § 742. *See* Defendant's Brief, pp. 9-10. The question of whether "forthwith" service is a jurisdictional requirement is unsettled in the Fifth Circuit.

The Second, Ninth, and Eleventh Circuits have held that "forthwith" service is jurisdictional. *Batttaglia* [sic] *v. United States*, 303 F.2d 683 (2nd Cir.), cert. dismissed, 371 U.S. 907 (1962), *Amella v. United States*, 732 F.2d 711 (9th Cir. 1984), *Libby v. United States*, 840 F.2d 818 (11th Cir. 1988). The Third Circuit, however, has held that the "forthwith" provision is merely procedural, and was

supplanted by Fed. R. Civ. P. 4. *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985).[3]

The Fifth Circuit has not addressed the issue. The case relied upon by Defendant, *Kieu v. United States*, 1993 AMC 1789 (5th Cir. 1992) (not otherwise reported), dealt with an entirely different issue. In *Kieu*, the Plaintiff **failed to name the United States as defendant** in a Suits in Admiralty action until **after** the two year statute of limitations had expired. *Id.* The case was decided on the basis that the Plaintiff's amended pleadings could not "relate back" to the original statute of limitations date. A careful review of the district court's order of dismissal, attached to Defendant's Brief, confirms this. *Kieu v. United States Department of Energy*, No. 90-CV-861, slip. op. (E.D. Tex. May 24, 1991) (Schell, J.) ("this court cannot allow the relation back of the amended complaint because there is no valid complaint filed within the statute of limitations to which it may properly relate back").

The holding of *Jones & Laughlin* has found favor with district courts of the Fifth Circuit. *See Estrain v. United States*, No. 92-479, 1992 U.S. Dist. LEXIS 7946 (E.D. La. June 2, 1992) (decided after *Kieu*); *Diversified Marine Int'l, Inc. v. United States*, 774 F.Supp. 1005, 1008 (E.D. La. 1991) ("this Court agrees the Third Circuit has adopted the better position"); *Farnsworth v. Sea-Land Service, Inc.*, No. 87-5954, 1989 U.S. Dist. LEXIS 2270 (E.D. La. March 7, 1989); *Phillips v. United States Army Corps of Engineers*, 629 F.Supp. 967 (S.D. Miss. 1986). *Contra Landry v. United*

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[3] 28 U.S.C. § 2072 states that "[a]ll laws in conflict with (the Federal Rules of Civil Procedure) shall be of no further force or effect after such rules have taken effect."

States, 815 F.Supp. 1000 (E.D. Tex. 1993) (Schell, J.) (appeal pending).

As discussed below, there can be no doubt that Plaintiff's service was timely, particularly in light of Judge Gibson's ruling of August 31, 1993. Under the holding of *Jones & Laughlin*, the procedural provisions of the Suits in Admiralty Act have been complied with by Plaintiff, and Defendant's Motion is groundless. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

III. Plaintiff's service was "forthwith," in that Plaintiff affected service with reasonable promptness, diligence and dispatch.

Even if "forthwith" service is jurisdictional, and it is not, Defendant's motion ignores that Plaintiff did affect service in a "forthwith" manner. As stated by the Fifth Circuit, **"(t)he word 'forthwith' is deliberately undefined, in our view, to allow courts to interpret it in the context of 'reasonableness,' on a case-by-case basis.** We are convinced that 'forthwith' requires no more or less than reasonable promptness, diligence or dispatch." *United States v. Bradley*, 428 F.2d 1013, 1015-16 (5th Cir. 1970) (emphasis supplied).

In the instant case, summons were requested the same instant that suit was filed. *See* Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey. The Summons was forwarded for service upon receipt of the same from the District Clerk for the Southern District of Texas. *Id.* The Constable returned the Summons once and lost it once. The matter was reviewed by Judge Gibson, who

granted Plaintiff a fifteen (15) day extension to complete service.

Plaintiff attempted to perfect service in April, May, June, July, and August, 1993. Unlike cases cited by Defendant where no efforts were made to obtain service, or an incorrect party was named as Defendant, Plaintiff has exercised reasonable promptness, diligence, and dispatch. *Bradley*, 428 F.2d at 1016. There is no evidence before the Court that Plaintiff has engaged in any delay of his own making. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

IV. Judge Gibson has already impliedly found "due diligence" and "good cause" on Plaintiff's part.

As noted above, the law of the case is that "due diligence" has been exercised by Plaintiff. On August 31, 1993, the Hon. Hugh Gibson, a judge of the Southern District of Texas, Galveston Division, considered Plaintiff's difficulties in obtaining service, and granted Plaintiff a fifteen (15) day extension from the initial scheduling conference to obtain service on the United States Attorney's office. It is inconsistent to hold that service was not "forthwith," when another judge has found "good cause" to grant a fifteen (15) day extension to obtain service. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

CONCLUSION

"Equity abhors forfeiture," is well established principle of the law for good cause. Plaintiff has sustained

serious injuries that will go unredressed if Defendant's Motion is granted.

Plaintiff contends that "forthwith" service is procedural, not substantive, as numerous district courts of the Fifth Circuit have agreed. Even if "forthwith" service is jurisdictional, this court has latitude to decide on a "case-by-case" basis if "forthwith" service has been obtained. In this case, Plaintiff made persistent, repeated efforts to obtain service that were only delayed by the United States District Clerk's and the Harris County Constable's offices. This is not a matter to be decided by a form brief such as the one filed by Defendant,[4] but by careful analysis of the facts.

For the foregoing reasons, Defendant's Motion to Dismiss should be, in all things, DENIED.

Dated: December 15, 1993.

Respectfully submitted,

JIM S. ADLER, P.C.
/s/ J. I. Ivey
JIM S. ADLER
TBC 00925000
J. K. IVEY
TBC 10428250
6161 Savoy, Suite 700
Houston, Texas 77036
(713) 953-9400
FAX (713) 953-9550

ATTORNEYS FOR PLAINTIFF

---

[4] Defendant's Brief concludes, "the district court's order denying the United States' Motion to dismiss should be reversed," indicating that at least one other court has rejected Defendant's specious argument.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been duly served upon all counsel in compliance with Fed. R. Civ. P. 5, on this the 15th day of DEC., 1993.

/s/ J. K. Ivey
JIM S. ADLER
J. K. IVEY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff,	§	CIVIL ACTION
VS.	§	NO. G-93-186
UNITED STATES OF AMERICA Defendants.	§	

AFFIDAVIT OF DAGNEE MCKINNEY

(Filed Dec. 16, 1993)

STATE OF TEXAS
KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF HARRIS

Before me the undersigned Notary Public on this day personally appeared Dagnee McKinney, who is known by me, and who first being duly sworn by me deposed and stated as follows:

My name is Dagnee McKinney. I am a paralegal in the law firm of Jim S. Adler, P.C. I am over eighteen years of age, have never been convicted of a felony, and am fully competent to make this affidavit. Each of the statements contained herein are true and correct and within my personal knowledge.

On April 8, 1993 we filed Plaintiff's Original Complaint. *See* attached *Exhibit "A"*. We did not receive completed Summons in a Civil Action forms (as requested) with the summons and on April 21, 1993, we sent summons forms for issuance of summons for U.S. defendants to the U.S. District Clerk.We received these forms in our

office on May 4, 1993. *See* true copies of summons forms attached as *Exhibit "B"*. On May 19, 1993, Plaintiff's Complaint was sent via certified mail to the United States Attorney General. It was received on May 25, 1993.

On May 25, 1993, we forwarded Plaintiff's Original Complaint for service to Constable Jack Abercia for service on U.S. Attorney for the Southern District of Texas. *See* copy of letter attached as *Exhibit "C"*. On June 1, 1993, Constable Jack Abercia's office informed us that they needed the Court's seal on each summons form prior to serving and they needed two additional summons forms. *See* letter from Constable Abercia's office attached as *Exhibit "D"*.

We again requested via mail additional summons forms from the U.S. District Court on July 19, 1993. *See* letter to District Clerk attached as *Exhibit "E"*. We did not initially receive the summons dated July 22, 1993. When we did not receive these summons forms. I personally called the Clerk (Carol) and informed her that we did not receive them. We then sent another letter requesting summons forms on August 19, 1993 to replace the ones that were apparently lost in the mail. *See* copy of August 19, 1993 letter attached as *Exhibit "F"*. On August 25, 1993, we received the duplicate, file stamped summons signed July 22, 1993 in our office. *See* a copy of the summons form attached as *Exhibit "G"*. Upon receiving the duplicate, file stamped summons with court seals, they were transmitted a second time to Constable Abercia's office on August 25, 1993. *See* letter to Constable Abercia's office attached as *Exhibit "H"*.

Prior to the scheduled status conference, I informed the Court Clerk that we were having difficulty beyond our control in obtaining service upon said defendants. On August 31, 1993, Judge Hugh Gibson granted us a fifteen (15) day extension to have U.S. of America served. To the best of my knowledge. Defendant was served on September 3, 1993, within the fifteen (15) days granted by the judge. A second Complaint was sent to Washington, D.C. on September 3, 1993, for personal service upon Hon. William Barr, Attorney General for the United States of America. *See* letter dated September 3, 1993, along with a copy of the executed summon [sic] on Defendant, attached as *Exhibit "I"*.

The exhibits attached hereto as *"A," "B," "C," "D", "E", "F", "G", "H", and "I"* were copied from the files maintained by the law firm of Jim S. Adler, P.C., in connection with the above entitled and numbered cause at my direction. I have compared each exhibit with the original from the file, and the same are true and correct copies.

Further, affiant sayeth not."

/s/ Dagnee McKinney
DAGNEE MCKINNEY

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public on this 15 day of December, 1993, to certify which witness my hand and seal of office.
[SEAL]

/s/ Angie Thibodeaux
NOTARY PUBLIC in and
for the State of Texas
My commission expires
11-25-95

CIV 1 (Rev. 10/82) **EXHIBIT "B"**

SUMMONS IN A CIVIL ACTION
UNITED STATES DISTRICT COURT
LLOYD HENDERSON
v.
UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFFS ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within forty-five (45) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Illegible

DATE
5/3/93

EXHIBIT "C"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

May 25, 1993

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return

to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "D"

[SEAL]
JACK F. ABERCIA, CONSTABLE
PRECINCT NUMBER ONE
HARRIS COUNTY, TEXAS

MAIN OFFICE
P.O. BOX 52578
HOUSTON, TEXAS
77052-2578
(713) 755-5200 FAX
(713) 755-8951

ANNEX OFFICE
7300 NORTH SHEPHERD
HOUSTON, TEXAS 77091
(713) 697-3600
FAX (713) 697-3649

JUNE 1, 1993

JIM S. ADLER, P.C.
6161 SAVOY STE. 700
HOUSTON, TX. 77036-3397

RE: G93186 LLOYD HENDERSON VS. UNITED STATES OF AMERICA

Dear Sir:

Your Civil Process is being returned for the following reasons:

___ Need $45.00 service fee (for each defendant, Company or Return of Service)

___ Need $50.00 service fee for all Writs

___ Your check is not signed

___ No Additional fee required

___ Unable to locate street address in the Harris County Key map

___ We need a complete physical address in order to serve defendant by personal service or a letter stating to serve defendant by Certified Mail

___ No service address

___ Your paper has expired – need a redate

___ Your paper needs a Texas Certified Seal

___ Please state the name of the person you want served with this corporation or Company

X Other We will need 2 summons both with court seals.

See attached!

REMARKS

Returning check #028569 in the amount of $45.00

/s/. Jackie Stelle
Deputy Clerk, Foreign Desk

EXHIBIT "E"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

July 19, 1993

Michael Milby, District Clerk
United States District Court
for the Southern District of Texas
Galveston Division
601 Rosenberg, Room 411
Galveston, Texas 77550

Re: Lloyd Henderson v. United States of America, United States Dept. of Transportation, Lykes Bros., Inc. and Lykes Bros. Steamship Co., Inc. U.S. District Court for the Southern District of Texas Galveston Division
Our File No. D91-668

Dear Sir:

Enclosed please find three (3) Summons in a Civil Action forms. The constable's office requests the court's seal on these summons prior to serving the citations.

Please stamp with seals accordingly and return to this office for further handling.

Thank you for your assistance in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JDI/dbm
Enclosures

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
(BY) DEPUTY CLERK
DATE

EXHIBIT "F"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

August 19, 1993

Michael Milby, District Clerk
United States District Court
for the Southern District of Texas
ATTN: Carol
Galveston Division
601 Rosenberg, Room 411
Galveston, Texas 77550

Re: Civil Action No. G-93-186; Lloyd Henderson v. United States of America, United States Dept. of Transportation, Lykes Bros., Inc. and Lykes Bros. Steamship Co., Inc. U.S. District Court for the Southern District of Texas, Galveston Division
Our File No. D91-668

Dear Carol:

Enclosed please find four (4) Summons in a Civil Action forms. Please stamp with seals accordingly and return to this office for further handling.

Thank you for your assistance in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey/ETJ
J. K. Ivey

JKI/dbm
Enclosures

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
(BY) DEPUTY CLERK
DATE

CIV 1 (Rev. 10/82) **EXHIBIT "G"**

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Linda Beauchamp

DATE
7-22-93

EXHIBIT "H"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

August 25, 1993

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Per your request dated June 1, 1993, enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "I"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

September 3, 1993

VIA HAND DELIVERY

PROFESSIONAL CIVIL PROCESS
3730 Kirby
Houston, Texas 77098

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Sirs:

Enclosed please find a summons along with Plaintiff's Original Complaint for personal service on the United States of America, c/o Hon. William Barr, Atty. General for the U.S. Dept. of Justice Room B-324, 10th Street and Constitution Avenue., N.W., Washington, D.C. 20530, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the District Clerk of the Court for filing among the papers in this cause.

Thank you for your prompt attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey by ms
J. K. Ivey

JKI/ms
Enclosure

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
440 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within forty-five (45) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CONSTABLE PRECINCT #1
Houston, Harris County, Texas
ATTEMPTED SERVICE

DATE	TIME	REMARKS
9/3	10:20 AM	Shirley Carl

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Illegible

DATE
5/3/93

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 1:93CV529
UNITED STATES OF AMERICA, Defendants.	§	

AFFIDAVIT OF MELANIE SEAGLER

(Filed Dec. 16, 1993)

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me the undersigned Notary Public on this day personally appeared Melanie Seagler, who is known by me, and who first being duly sworn by me deposed and stated as follows:

My name is Melanie Seagler. I am a legal secretary with the law firm of Jim S. Adler, P.C. I am over eighteen years of age, have never been convicted of a felony, and am fully competent to make this affidavit. Each of the statements contained herein are true and correct and within my personal knowledge.

On May 25, 1993, I forwarded Plaintiff's Original Complaint for service to Constable Jack Abercia for service on U.S. Attorney for the Southern District of Galveston. See Exhibit "A". On June 1, 1993, Constable Jack Abercia's office informed our office that they needed the

court's seal on each summons form prior to serving. See Exhibit "B". Dee, from our office requested additional summons forms from the U.S. District Court. Through much delay on the Court's part, the summons forms were not received in our office until late August. Immediately upon receiving the summons forms, on August 25, 1993, I sent the summons and complaint again to Abercia's office. See Exhibit "C".

On August 31, 1993, Judge Hugh Gibson granted us a fifteen day extension to have the United States of America served. I forwarded the summons along with Plaintiff's Original Complaint to Proffesional [sic] Civil Process on September 3, 1993. See Exhibit "C". The United States of America was served through the Hon. William Barr on September 9, 1993. See Exhibit "E".

The exhibits attached hereto as "A", "B", "C", "D", and "E" were copied from the files maintained by the law firm of Jim S. Adler, P.C., in connection with the above entitled and numbered cause at my direction. I have compared each exhibit with the original from the file, and the same are true and correct copies.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Melanie Seagler
MELANIE SEAGLER

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public on this 15th day of December, 1993, to certify which witness my hand and seal of office.

(SEAL)
ANGIE THIBODAUX
MY COMMISSION
EXPIRES
November 25, 1995

/s/ Angie Thibodaux
NOTARY PUBLIC
in and for the
State of Texas
My commission
expires 11-25-95

EXHIBIT "A"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J. K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

May 25, 1993

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return

to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "B"

(SEAL) JACK F. ABERCIA, CONSTABLE

PRECINCT NUMBER ONE
HARRIS COUNTY, TEXAS

MAIN OFFICE
P.O. BOX 52578
HOUSTON, TEXAS
77052-2578
(713) 755-5200
FAX (713) 755-8951

ANNEX OFFICE
7300 NORTH SHEPHERD
HOUSTON, TEXAS 77091
(713) 697-3600
FAX (713) 697-3649

JUNE 1, 1993

JIM S. ADLER P.C.
6161 Savoy Ste. 700
HOUSTON, TX. 77036-3397

RE: G93186 LLOYD HENDERSON VS. UNITED STATES OF AMERICA

Dear Sir:

Your Civil Process is being returned for the following reasons:

_ Need $45.00 service fee (for each defendant, Company or Return of Service)

_ Need $50.00 service fee for all Writs

_ Your check is not signed

_ No Additional fee required

_ Unable to locate street address in the Harris County Key map

_ We need a complete physical address in order to serve defendant by personal service or a letter stating to serve defendant by Certified Mail

_ No service address

_ Your paper has expired – need a redate

_ Your paper needs a Texas Certified Seal

_ Please state the name of the person you want served with this corporation or Company

X Other

WE WILL NEED 2 SUMMONS
BOTH WITH COURT SEALS. See attached!

REMARKS

RETURNING CHECK #028569 IN THE AMOUNT OF $45.00

Jackie Stelle
Deputy Clerk, Foreign Desk

EXHIBIT "C"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
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August 25, 1993

FILE
CORRESPONDENCE

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Per your request dated June 1, 1993, enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "D"

JIM S. ADLER
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September 3, 1993

VIA HAND DELIVERY

PROFESSIONAL CIVIL PROCESS
3730 Kirby
Houston, Texas 77098

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Sirs:

Enclosed please find the summons along with Plaintiff's Original Complaint for personal service on the United States of America, c/o Hon. William Barr, Atty. General for the U.S. Dept. of Justice Room B-324, 10th Street and Constitution Avenue., N.W., Washington, D.C. 20530, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the District Clerk of the Court for filing among the papers in this cause.

Thank you for your prompt attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

by ms

JKI/ms
Enclosure

EXHIBIT "E"

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF TEXAS

CASE NO. G-93-186

LLOYD HENDERSON

VS.

UNITED STATES OF AMERICA

AFFIDAVIT OF SERVICE BY SPECIAL PROCESS SERVER

I, DAVID E KIRLIN, having been duly authorized to make the service of the process in the above entitled case, hereby depose and say:

That I am not a party to or otherwise interested in this suit. That my age and date of birth are as follows: 52, May 19, 1941. That my business address is 306 H STREET NE, WASHINGTON D C 20002

That at 01:30 p.m. on September 9, 1993, I served the within named DEFENDANT\UNITED STATES OF AMERICA SERVE: ATTORNEY GENERAL OF THE UNITED STATES by leaving a copy of the

SUMMONS IN A CIVIL ACTION AND PLAINTIFF'S ORIGINAL COMPLAINT at the DEFENDANT'S usual place of employment US DEPT OF JUSTICE; 10TH & CONSTITUTION AVENUE NW, WASHINGTON, DC with TEREASA NELSON.

That such person is the CLERK, AUTHORIZED TO ACCEPT SERVICE of the within named.

That Affiant describes, to the best of his ability, such person as follows:

Female Black Skin Black Hair

Approximately: 28 Yrs. 5 Ft., 05 In. 150 Lbs.

Washington, the District of Columbia

Subscribed and Sworn to before me this

13 day of Sept. , 1993

/s/ David E Kirlin
DAVID E KIRLIN

/s/ Illegible

My commission Expires: 8/30/94/

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
C/O HON. WILLIAM BARR
ATTY. GENERAL FOR THE U.S. DEPT. OF JUSTICE
ROOM B-324
10TH STREET AND CONSTITUTION AVENUE., N.W.
WASHINGTON, D. C. 20530

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P. C., 6161 SAVOY, SUITE 700,
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Illegible

DATE
Aug. 25, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	)	
Plaintiff,	)	
vs.	)	C.A. No. 9-CV-529
UNITED STATES OF AMERICA	)	
Defendant.	)	

UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, RENEWED MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

(Filed May 13, 1994)

The Defendant moves this Court to dismiss the United States pursuant to Rule 12(b)(1) Fed. R. Civ. P. In support of this motion the United States relies upon the pleadings and Memorandum Of Law In Support.

WHEREFORE, the United States prays that this motion to dismiss the United States be granted and the attached Order entered.

Dated: May 12, 1994

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
TIMOTHY R. LORD, Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271
Telephone: (202) 616-4026

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	)	
Plaintiff,	)	
vs.	)	C.A. No. 9-CV-529
UNITED STATES OF AMERICA	)	
Defendant.	)	

DEFENDANT UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

STATEMENT OF FACTS AND INTRODUCTION

The plaintiff, Lloyd Henderson, claims he suffered injuries while working as a seaman aboard a vessel owned by the United States. His claim is enforceable pursuant to the Suits in Admiralty Act (SAA), 46 U.S.C. app. §§ 741-752. On April 8, 1993, the plaintiff filed suit in the Southern District of Texas. On September 3, 1993, 150 days after filing the complaint, the plaintiff properly effected service upon the United States. Subsequently, the case was transferred to this Court.

On January 21, 1994, this Court denied the United States' motion to dismiss for lack of subject matter jurisdiction for failure to effect "forthwith" service as required by § 742 of the SAA. The trial date, however, was extended pending issuance of a controlling decision from the Fifth Circuit concerning forthwith service. *United States v. Holmberg*, Appeal No. 3468, (Fifth Cir. May 2,

1994). According to the holding in that case, this action should be dismissed for lack of subject matter jurisdiction.

ARGUMENT

The Plaintiff's Action Should Be Dismissed Pursuant To Fifth Circuit Precedent In Holmberg.

In *Holmberg*, the plaintiff failed to effect service of process until 106 days after filing his complaint. Like the instant case, the United States moved to dismiss pursuant to Rule 12(b)(1) for failure to serve forthwith. The district court in *Holmberg* denied the motion but certified the question of whether the forthwith service provision was superseded by Rule 4(J), Fed. R. Civ. P. *Holmberg v. OMI Ship Management, Inc.*, No. 92-3749, WL 165774 (E.D. La. May 6, 1993).

On appeal, the Fifth Circuit held that the forthwith service requirement of the SAA is a jurisdictional prerequisite to sue the United States which was not modified by Rule 4(J). While the *Holmberg* court did not define (in terms of days) what constituted forthwith service, the court concluded "that under any definition, service in 103 or 106 days is not forthwith." *Holmberg* at 3835. The court summarily rejected the plaintiff's argument that the holding in *Holmberg* should not have retroactive effect, then reversed the district court's decision and remanded with instructions to dismiss for lack of subject matter jurisdiction. *Id.*

In the instant case, Henderson effected proper service upon the United States at 150 Days. The *Holmberg* court held that the forthwith service provision of the SAA is

jurisdictional and service at 103 days is not forthwith. In fact, the court referred favorably to circuit court decisions holding that service after 60 days is not forthwith. *Id.* (citing *Amella v. United States*, 303 F.2d 711 (9th Cir. 1984); *City of New York v. McAllister Bros, Inc.*, 278 F.2d 708, 710 (2d cir. 1960)). According to Fifth Circuit precedent as established in *Holmberg*, the plaintiff's service of process at 150 days does not comply with the forthwith service requirement contained in § 742 of the SAA and, therefore, the complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the plaintiff's complaint should be dismissed for lack of subject matter jurisdiction. Rule 12(b)(1), Fed. R. Civ. P.

Dated: May 12, 1994

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
TIMOTHY R. LORD, Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271
Telephone: (202) 616-4026

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant United States' Motion For Judgement [sic] On The Pleadings Or, In The Alternative, Renewed Motion To Dismiss For Lack Of Subject Matter Jurisdiction, Memorandum In Support and proposed Order has been mailed pre-paid postage on May 12, 1994 to the following counsel of record:

J.K. Ivey, Jim Adler
6161 Savoy, Suite 700
Houston, TX 77036-3397
(713) 953-9400

/s/ Timothy R. Lord
TIMOTHY R. LORD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA Defendants.	§	NO. 93-CV-529

PLAINTIFF'S RESPONSE IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION FOR JUDGMENT ON PLEADINGS OR MOTION TO DISMISS

(Filed May 26, 1994)

Plaintiff, LLOYD HENDERSON, files this Response in Opposition to the Motion for Judgment on the Pleadings or, In the Alternative, Renewed Motion to Dismiss for Lack of Jurisdiction (the "Motion") of Defendant, UNITED STATES OF AMERICA, and would respectfully show as follows:

STATEMENT OF FACTS[1]

Plaintiff was injured on August 29, 1992, while working as a seaman aboard the M/V DELMONTE, a vessel owned by the United States through the Maritime

[1] The following Statement of Facts includes a summary of the Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey, originally filed December 16, 1993, which are incorporated herein by reference.

Administration. On May 29, 1992, Plaintiff filed an administrative claim for his injuries, as required by the Clarification Act. 50 U.S.C. § 1291. Sixty days later, the claim was denied. The foregoing is admitted by Defendant.

On April 8, 1993, Plaintiff timely commenced this action against Defendant in the United States District Court for the Southern District of Texas, Galveston Division. Summons forms were not received by Plaintiff's counsel, as requested, with file stamped copies of the Complaint. Summons forms were obtained, completed, and then forwarded to the District Clerk for the Souther [sic] District of Texas, Galveston Division, on April 21, 1993. The completed summons were received by Plaintiff's counsel on May 3, 1993.

On May 19, 1993, Plaintiff's Summon and Complaint was sent via certified mail to the United States Attorney General, and received on May 25, 1993.

On May 26, 1993, Plaintiff's Complaint was forwarded for service to Constable Jack Abercia by Plaintiff's counsel, for service on U.S. Attorney for the Southern District of Texas. On June 1, 1993, Constable Jack Abercia's office wrote to Plaintiff's counsel that it required the Court's seal on **each** summons form prior to serving, and that it needed two additional summons forms.

Plaintiff's counsel again requested, via mail, additional summons forms from the U. S. District Court. When then [sic] were not received, Plaintiff's counsel called the Clerk, and informed the Clerk's office that they were not received. Plaintiff's counsel sent duplicate

copies of the summons forms, to replace the ones that were apparently lost in the mail.

Plaintiff's counsel again requested the summons forms from the District Clerk's office on July 19, 1993 and August 18, 1993. Upon receiving the duplicate, file stamped summons, they were transmitted a second time to Constable Abercia's office on August 25, 1993.

On August 31, 1993, Judge Hugh Gibson considered Plaintiff's difficulty in obtaining service, and granted Plaintiff an additional fifteen (15) days to obtain service on the Defendant. Service was obtained on September 3, 1993. In an abundance of caution, a second Complaint was sent to Washington, D.C., on September 3, 1993, for personal service upon Hon. William Barr, Attorney General for the United States of America.

On October 15, 1993, Defendant first appeared herein and filed its Unopposed Motion to Transfer Venue, seeking to transfer this matter to the Eastern District of Texas, Beaumont Division. The Motion to Transfer Venue was granted. On November 15, 1993, Defendant filed its first Motion to Dismiss. Defendant asserted, as now, that Plaintiff did not "forthwith" obtain service on the United States Attorney, as required by the Suits in Admiralty Act, in that 150 days elapsed between the filing of Plaintiff's Complaint and service on the United States Attorney for the Southern District of Texas. 46 U.S.C. § 742. **The Motion was denied by this Court on January 21, 1994.** For the reasons stated below, Defendant's Motion is still without merit and should again be, in all things, DENIED.

ARGUMENT

I. Plaintiff's service was "forthwith," in that Plaintiff affected service with reasonable promptness, diligence and dispatch.

Defendant's Motion presents, for the third time, its time worn argument that "forthwith" service is jurisdictional. *See* Order denying Motion to Dismiss dated January 21, 1994. Defendant's motion ignores that Plaintiff did affect service in a "forthwith" manner. As stated by the Fifth Circuit, **"(t)he word 'forthwith' is deliberately undefined, in our view, to allow courts to interpret it in the context of 'reasonableness,' on a case-by-case basis.** We are convinced that 'forthwith' requires no more or less than reasonable promptness, diligence or dispatch." *United States v. Bradley*, 428 F.2d 1013, 1015-16 (5th Cir. 1970) (emphasis supplied); *See United States v. Holmberg*, 19 F.3rd 1062 (5th Cir. 1994) (same).

In the instant case, summons were requested the same instant that suit was filed. *See* Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey. The Summons was forwarded for service upon receipt of the same from the District Clerk for the Southern District of Texas. *Id.* The Constable returned the Summons once and lost it once. The matter was reviewed by Judge Gibson, who granted Plaintiff a fifteen (15) day extension to complete service.

Plaintiff attempted to perfect service in April, May, June, July, and August, 1993. Unlike cases cited by Defendant where no efforts were made to obtain service, or an incorrect party was named as Defendant, Plaintiff has exercised reasonable promptness, diligence, and dispatch.

Bradley, 428 F.2d at 1016. There is no evidence before the Court that Plaintiff has engaged in any delay of his own making. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

II. Judge Gibson and this Court have already found "due diligence" and "good cause" on Plaintiff's part.

As noted above, the law of the case is that "due diligence" has been exercised by Plaintiff. On August 31, 1993, the Hon. Hugh Gibson, a judge of the Southern District of Texas, Galveston Division, considered Plaintiff's difficulties in obtaining service, and granted Plaintiff a fifteen (15) day extension from the initial scheduling conference to obtain service on the United States Attorney's office. It is inconsistent to hold that service was not "forthwith," when another judge has found "good cause" to grant a fifteen (15) day extension to obtain service.

Defendant's Motion reasserts the exact same arguments set forth in it [sic] Motion to Dismiss filed November 15, 1993. The Motion has already been denied by the Court by order dated January 21, 1994. Accordingly, Defendant's Motion to Dismiss should again be, in all things, DENIED.

CONCLUSION

"Equity abhors forfeiture," is well established principle of the law for good cause. Plaintiff has sustained serious injuries that will go unredressed if Defendant's Motion is granted.

Plaintiff contends that this Court has latitude to decide on a "case-by-case" basis if "forthwith" service has been obtained. In this case, Plaintiff made persistent, repeated efforts to obtain service that were only delayed by the United States District Clerk's and the Harris County Constable's offices.

For the foregoing reasons, Defendant's Motion to Dismiss should be, in all things, DENIED.

Dated: May 20, 1993.

Respectfully submitted,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. IVEY
FED ID 11132
TBC 10428250
6161 Savoy, Suite 700
Houston, Texas 77036
(713) 953-9400
FAX (713) 953-9550

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been duly served upon all counsel in compliance with Fed. R. Civ. P. 5, on this the 26TH day of MAY, 1994.

/s/ J. K. IVEY
JIM S. ADLER
J. K. IVEY